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UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
WASHINGTON, DC

Issued by the Department of Transportation on January 8, 2003

NOTICE OF ACTION TAKEN -- DOCKET OST-2000-6824-13

This serves as notice to the public of the action described below, taken by the Department official indicated (no additional confirming order will be issued in this matter).

Joint application of American Airlines, Inc. and Cathay Pacific Airways, Ltd. filed 01/24/2000
amended 11/03/2000
supplemented 11/05/2002 for:

XX Exemptions under 49 U.S.C 40109 and Statements of Authorization under 14 CFR 212 for American Airlines, Inc.; TWA Airlines, LLC; American Eagle Airlines, Inc., or Executive Airlines, Inc. d/b/a American Eagle and Cathay Pacific Airways, Ltd. to the extent necessary to permit applicants to conduct reciprocal code share operations as follows:¹

American to display the "CX" designator code on flights operated by American, TWA, American Eagle or Executive Airlines d/b/a American Eagle:

(1) between and among Cathay Pacific's U.S. and Canadian gateways; (2) beyond Cathay Pacific's U.S. and Canadian gateways to 20 U.S. points, subject to confirmation by diplomatic note from the Government of Hong Kong to the Government of the United States, as follows: Atlanta, Austin, Boston, Chicago, Dallas/Ft. Worth, Denver, Detroit, Ft. Lauderdale, Hartford, Houston, Las Vegas, Miami, Orlando, Philadelphia, Pittsburgh, San Diego, San Jose, San Juan, St. Louis, and Washington/Baltimore; (c) between the United States and third-country points intermediate to Hong Kong, connecting to flights operated by Cathay Pacific between such points and Hong Kong; and (d) beyond the United States to third-country points.

American also requests the authority to integrate the underlying authority it needs to code share with Cathay Pacific with its existing exemption and certificate authorities.

Cathay Pacific Airways, Ltd. to display the "AA" designator code on flights operated by Cathay Pacific:

(1) between Hong Kong and Cathay Pacific's U.S. gateways; (2) between Hong Kong and third-country points intermediate to the United States, connecting to flights operated by American between such points and the United States; and (3) beyond Hong Kong to third-country points.

¹ The Joint Applicants state that they give notice that they initially intend to code share between and among Cathay Pacific's U.S. gateways of Los Angeles, San Francisco, and New York/Newark and that they give initial notice of Tokyo, Japan, as an intermediate code-share point, and of Bangkok, Thailand; Kuala Lumpur and Penang, Malaysia; and Singapore as beyond code-share points.

United Air Lines filed an answer to the Supplement filed November 5, 2002, and American/Cathay Pacific filed a joint reply.²

United states that it does not oppose the American/Cathay Pacific application as long as the Department's authorization does not exceed the scope of code-share rights provided for under the October 19, 2002, U.S.-Hong Kong Memorandum of Understanding (MOU). In this regard, United states that the MOU contains specific restrictions with respect to the number of U.S. cities that may be served on a code-share basis and the frequency of such code-share service. United maintains that, contrary to these restrictions, American/Cathay Pacific have requested that the code-share authorization be "framed in general terms," subject to a 30-day notice requirement to identify specific points or routes. United argues that it is not consistent with the Department's standard practice to issue blanket code-share statements of authorization in the absence of an open-skies agreement. United cites the limitations on its code-share arrangement with British Midland and states that the Department should not grant American/Cathay Pacific a blanket statement of authorization unless it is willing to grant the same form of authority to United/British Midland.

United states that American/Cathay Pacific have applied for authority to code share to 20 interior U.S. points apart from the three U.S. gateway points (New York/Newark, San Francisco, and Los Angeles) that Cathay Pacific already serves with its own aircraft. In total, United maintains that American/Cathay Pacific have applied to serve 23 U.S. points. In this regard, United argues that the MOU does not address whether a Hong Kong carrier may exceed the 20-point limit by code sharing from U.S. points that it already serves with its own equipment. By adopting the American/Cathay Pacific interpretation, United argues that the Department would be granting Cathay Pacific liberalized benefits beyond the limited terms of the MOU without any assurance of reciprocity on the part of Hong Kong in issuing new operating rights to U.S. carriers.

Finally, United argues that the MOU limits the frequency of code-share services between each U.S. or Canadian point of direct service and each U.S. code-share point to 21 weekly round-trip frequencies. According to United, American and Cathay Pacific have not disclosed how many code-share frequencies they propose to operate. United maintains that the Department should make explicit in any authorization granted to American/Cathay Pacific that the MOU's limitations regarding code-share operations apply to the American/Cathay Pacific arrangement. In this connection, United argues that such limitations cannot be imposed using the blanket form of authorization sought by American/Cathay Pacific.

In its reply, American states that the Department has used the 30-day notice approach in other cases without open skies, such as the United/All Nippon Airways and the American/Japan Air Lines code share arrangements under the Japan agreement, and the United/Virgin Blue code share under the Australia agreement.³ In this regard, American argues that the Department should adopt the same 30-day approach here. American maintains that the 30-day notice model gives carriers flexibility to adjust their code-share operations as market conditions warrant and that the 30-day approach relieves the Department of unnecessary administrative burdens.

American states that United urges an unreasonable interpretation of the MOU, which would in effect reduce the number of authorized code-share points by counting Cathay Pacific's three U.S. gateway points in the list of chosen code-share points. American argues that adopting United's interpretation would be contrary to the liberalizing intent of the MOU and would be contrary to the public interest factors of consumer choice and enhanced competition in interior U.S. markets. Finally, American/Cathay Pacific state that they will comply with the limit of 21 weekly round-trip code-share frequencies in operating their proposed services, and that the Joint Applicants will be limited by the terms of the MOU regardless of what process the Department adopts here.

²United, Northwest Airlines, and Continental Airlines filed answers to the initial application filed January 24, 2000, and American/Cathay Pacific filed a reply. United and Northwest filed answers to the amendment to the application filed November 3, 2000. These prior filings concerned the lack of code-sharing provisions in the U.S.-Hong Kong agreement. Since the time of these prior filings, the United States and the Hong Kong Special Administrative Region of the People's Republic of China ("Hong Kong") signed a Memorandum of Understanding (MOU) dated October 19, 2002, which provides for code-sharing services. In these circumstances, we need not address the previous pleadings in this case.

³United argues that the Japan cases are inapposite because the U.S.-Japan agreement, while not open skies, is not restrictive with respect to bilateral code sharing.

Applicant reps: Carl Nelson for American (202) 496-5647 and Bill Evans for Cathay Pacific (202) 371-6000

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DISPOSITION

XX Granted, in part, subject to conditions (see remarks below).

XX Balance dismissed (*i.e.*, Statement of Authorization for American -- and its affiliates -- to display Cathay Pacific's code between Los Angeles and San Francisco, and to Hartford)
(see remarks below)

The above action with respect to the exemption authorities granted was effective when taken: January 8, 2003, through January 8, 2005.

The above action with respect to the Statements of Authorization was effective when taken: January 8, 2003, and will remain in effect indefinitely, subject to conditions (see remarks below).

Action taken by: **Read C. Van de Water**
Assistant Secretary for Aviation and International Affairs

XX The authority granted is consistent with the October 19, 2002, Memorandum of Understanding between the United States and the Hong Kong Special Administrative Region of the People's Republic of China.

Except to the extent exempted or waived, this authority is subject to the terms, conditions, and limitations indicated:

XX American's certificates of public convenience and necessity
XX Standard Exemption Conditions (attached)
XX Cathay Pacific's foreign air carrier permit

Remarks: We have decided to grant the broad Statements of Authorization requested by American/Cathay Pacific, subject to a 30-day notice requirement to identify specific points prior to the commencement of new services, and to grant the related exemption authority needed to support such operations. (See conditions below). We determined that this approach will afford the carriers flexibility to adjust their code-share operations as market conditions warrant and that it will also enhance administrative efficiency. We have provided safeguards to ensure operations consistent with the public interest. Specifically, the authority we are awarding is expressly conditioned so as to be limited by the terms of the MOU. Moreover, interested parties will have an opportunity to review and comment upon the 30-day notices submitted by American/Cathay Pacific in this docket prior to the commencement of new services. In these circumstances, we do not find that it would be detrimental to the public interest to grant, subject to the limitations and conditions set forth in this notice, the authority requested by the Joint Applicants in this case.⁴

With respect to the Statement of Authorization for American and its affiliates, we have received confirmation by diplomatic note from the Government of Hong Kong that it selects the following 20 U.S. code-share points under the MOU: Atlanta, Austin, Boston, Chicago, Dallas/Ft. Worth, Denver, Detroit, Ft. Lauderdale, Houston, Las Vegas, Miami, New York/Newark, Orlando, Philadelphia, Pittsburgh, San Diego, San Jose, San Juan, St. Louis, and Washington/Baltimore. Consistent with the terms of the authority we are awarding and the associated conditions (see below), these 20 U.S. points are the ones that are available at this time for display of Cathay Pacific's code on flights operated by American and its affiliates. In this regard, we are dismissing the Joint Applicants' request to code share between Los Angeles and San Francisco, and to Hartford.

Finally, with respect to United's comments on the MOU's code-share frequency limitations, we have added a condition (see below) explicitly limiting the code-share operations to no more than the level of weekly frequencies permitted for code-share services under the U.S.-Hong Kong MOU.

⁴ United has argued that in the event that the Department adopted the 30-day approach here, it should grant similar flexibility to the United/British Midland code share. We view United's concern as one that is more appropriately addressed in the context of a United/British Midland application, not in the context of the present American/Cathay Pacific application.

Conditions:

The exemption authority granted to American is subject to the following conditions:

- (1) Any service provided under the route integration authority granted shall be consistent with all applicable agreements between the United States and the foreign countries involved, and further (a) nothing in our award of the route integration authority granted should be construed as conferring upon American rights (including fifth-freedom, intermediate and/or beyond rights) to serve markets where U.S. carrier entry is limited unless American notifies us of its intent to serve such a market and unless and until the Department has completed any necessary carrier selection procedures to determine which carrier(s) should be authorized to exercise such rights, and (b) should there be a request by any carrier to use the limited-entry route rights that are included in American's authority by virtue of the route integration exemption granted here, but that are not then being used by American, the holding of such authority by route integration will not be considered as providing American a preference in a competitive carrier selection proceeding to determine which carrier(s) should be entitled to use the authority at issue.
- (2) The authority granted to operate to third countries is limited to countries with which the United States has signed open-skies agreements and/or countries for which the carrier holds authority to serve under certificates or exemptions issued by the Department, and for which it holds route integration authority by virtue of either the present action or other action of the Department.

The authority granted each applicant is limited to code-share operations with each other under the terms of the code-share agreement filed in this docket.

The Statements of Authorization granted here to American Airlines and Cathay Pacific Airways, Ltd. are subject to the following conditions:

- (a) The statements of authorization will remain in effect only as long as (i) American and Cathay Pacific continue to hold the necessary underlying authority to operate the code-share services at issue, and (ii) the code-share agreement providing for the code-share operations remains in effect.
- (b) American and/or Cathay Pacific must promptly notify the Department (Office of International Aviation) if the code-share agreement providing for the code-share operations is no longer effective or the carriers decide to cease operating any or all of the approved code-share services.⁵ (Such notice should be filed in Docket OST-2000-6824.)
- (c) American and/or Cathay Pacific must notify the Department no later than 30 days before they begin any new code-share service under the code-share services authorized here. Such notice shall identify the market(s) to be served, which carrier will be operating the aircraft in the code-share market added, and the date on which the service will begin. (Such notice should be filed in Docket OST-2000-6824.)
- (d) The code-share operations authorized herein shall be operated within the level of code-share frequencies provided for under the U.S.-Hong Kong Memorandum of Understanding of October 19, 2002.
- (e) The authority for Cathay Pacific to display its code on flights operated by American and its affiliates shall be limited to those code-share points which may be served by Cathay Pacific under the U.S.-Hong Kong Memorandum of Understanding of October 19, 2002.⁶

⁵We expect this notification to be received within ten (10) days after such non-effectiveness or of such decision.

⁶ Should the Government of Hong Kong change its selection of U.S. points (noted herein), the applicants will, upon the effective date of the change, lose their authorization to serve any such deselected point. Should the applicants elect to serve any point newly selected by the Government of Hong Kong, the applicants must give notice of their intent (consistent with the provisions noted above) of such service.

(f) The code-sharing operations conducted under this authority must comply with Part 257 and with any amendments to the Department's regulations concerning code-share arrangements that may be adopted. Notwithstanding any provisions in the contract between the carriers, our approval here is expressly conditioned upon the requirements that the subject foreign air transportation be sold in the name of the carrier holding out such service in computer reservation systems and elsewhere; that the carrier selling such transportation (*i.e.*, the carrier shown on the ticket) accept responsibility for the entirety of the code share journey for all obligations established in its contract of carriage with the passenger; and that the passenger liability of the operating carrier be unaffected. Further, the operating carrier shall not permit the code of its U.S. code-sharing carrier to be carried on any flight that enters, departs, or transits the airspace of any area for whose airspace the Federal Aviation Administration has issued a flight prohibition.

(g) The authority granted American to operate to third countries is subject to the condition that any service provided shall be consistent with all applicable agreements between the United States and the foreign countries involved. Furthermore, (i) nothing in the award of this blanket statement of authorization should be construed as conferring upon American rights (including code-share, fifth-freedom intermediate and/or beyond rights) to serve markets where U.S. carrier rights are limited unless American notifies us of its intent to serve such market and unless and until the Department has completed any necessary carrier selection procedures to determine which carrier(s) should be authorized to exercise such rights;⁷ and should there be a request by any carrier to use the limited-entry route rights that are included in American's authority by virtue of the blanket statement of authorization granted here, but that are not then being used by American, the holding of such authority will not be considered as providing any preference for American in a competitive carrier selection proceeding to determine which carrier(s) should be entitled to use the authority at issue.

(h) The authority granted here is specifically conditioned so that neither American nor Cathay Pacific shall give any force or effect to any contractual provisions between themselves that are contrary to these conditions.

On the basis of data officially noticeable, we found the applicants qualified to provide the services authorized.

In taking this action, we found that (1) our action was consistent with Department policy; (2) grant of the authority was consistent with the public interest; and (3) grant of the authority would not constitute a major regulatory action under the Energy Policy and Conservation Act of 1975. To the extent not granted or dismissed, we denied all requests in the referenced Docket. We may amend, modify, or revoke the authority granted in this Notice at any time without hearing at our discretion.

*An electronic version of this order is available on the World Wide Web at
http://dms.dot.gov/reports/reports_aviation.asp*

⁷ The notice referenced in condition (c) above may be used for this notification, *provided that*, any such operations cannot be operated without further Department action, and any such operations must be identified in the notice filed by American.

APPENDIX A

U.S. CARRIER
Standard Exemption Conditions

In the conduct of operations authorized by the attached notice, the applicant(s) shall:

- (1) Hold at all times effective operating authority from the government of each country served;
- (2) Comply with applicable requirements concerning oversales contained in 14 CFR 250 (for scheduled operations, if authorized);
- (3) Comply with the requirements for reporting data contained in 14 CFR 241;
- (4) Comply with requirements for minimum insurance coverage, and for certifying that coverage to the Department, contained in 14 CFR 205;
- (5) Except as specifically exempted or otherwise provided for in a Department Order, comply with the requirements of 14 CFR 203, concerning waiver of Warsaw Convention liability limits and defenses;
- (6) Comply with the applicable requirements of the Federal Aviation Administration Regulations and with all applicable U.S. Government requirements concerning security;⁸ and
- (7) Comply with such other reasonable terms, conditions, and limitations required by the public interest as may be prescribed by the Department of Transportation, with all applicable orders and regulations of other U.S. agencies and courts, and with all applicable laws of the United States.

The authority granted shall be effective only during the period when the holder is in compliance with the conditions imposed above.

⁸To assure compliance with all applicable U.S. Government requirements concerning security, the holder should, before commencing any new service (including charter flights) to or from a foreign airport, inform its Principal Security Inspector of its plans.

FOREIGN AIR CARRIER CONDITIONS OF AUTHORITY

In the conduct of the operations authorized, the holder shall:

- (1) Not conduct any operations unless it holds a currently effective authorization from its homeland for such operations, and it has filed a copy of such authorization with the Department;
- (2) Comply with all applicable requirements of the Federal Aviation Administration, including, but not limited to, 14 CFR Parts 129, 91, and 36, and with all applicable U.S. Government requirements concerning security;¹
- (3) Comply with the requirements for minimum insurance coverage contained in 14 CFR Part 205, and, prior to the commencement of any operations under this authority, file evidence of such coverage, in the form of a completed OST Form 6411, with the Federal Aviation Administration's Program Management Branch (AFS-260), Flight Standards Service (any changes to, or termination of, insurance also shall be filed with that office);
- (4) Not operate aircraft under this authority unless it complies with operational safety requirements at least equivalent to Annex 6 of the Chicago Convention;
- (5) Conform to the airworthiness and airman competency requirements of its Government for international air services;
- (6) Except as specifically exempted or otherwise provided for in a Department Order, comply with the requirements of 14 CFR Part 203, concerning waiver of Warsaw Convention liability limits and defenses;
- (7) Agree that operations under this authority constitute a waiver of sovereign immunity, for the purposes of 28 U.S.C. 1605(a), but only with respect to those actions or proceedings instituted against it in any court or other tribunal in the United States that are:

(a) based on its operations in international air transportation that, according to the contract of carriage, include a point in the United States as a point of origin, point of destination, or agreed stopping place, or for which the contract of carriage was purchased in the United States; or

(b) based on a claim under any international agreement or treaty cognizable in any court or other tribunal of the United States.

In this condition, the term "international air transportation" means "international transportation" as defined by the Warsaw Convention, except that all States shall be considered to be High Contracting Parties for the purpose of this definition;

- (8) Except as specifically authorized by the Department, originate or terminate all flights to/from the United States in its homeland;
- (9) Comply with the requirements of 14 CFR Part 217, concerning the reporting of scheduled, nonscheduled, and charter data;
- (10) If charter operations are authorized, except as otherwise provided in the applicable aviation agreement, comply with the Department's rules governing charters (including 14 CFR Parts 212 and 380); and
- (11) Comply with such other reasonable terms, conditions, and limitations required by the public interest as may be prescribed by the Department, with all applicable orders or regulations of other U.S. agencies and courts, and with all applicable laws of the United States.

This authority shall not be effective during any period when the holder is not in compliance with the conditions imposed above. Moreover, this authority cannot be sold or otherwise transferred without explicit Department approval under Title 49 of the U.S. Code (formerly the Federal Aviation Act of 1958, as amended).

¹To assure compliance with all applicable U.S. Government requirements concerning security, the holder should, before commencing any new service (including charter flights) from a foreign airport that would be the holder's last point of departure for the United States, inform its Principal Security Inspector of its plans.

